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ART. VI.—*A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions.*
By DANIEL DAVIS, Solicitor General of Massachusetts.
8vo. pp. 687. Boston. Cummings, Hilliard and Co.
1824.

A CORRECT, practical guide for justices of the peace in criminal prosecutions, presenting an analysis of their duties, in a convenient and accessible form, has long been wanted. The office of a justice is of the highest importance to the public. He has a very extensive and summary jurisdiction. He has power to arrest and imprison any of his fellow citizens. In cases of smaller offences he regulates the punishment; in complaints for the higher crimes he examines the circumstances of the case, discharges the accused or commits him for trial, and either refuses or regulates the bail, at his own discretion. The cases in which he is required to act are numberless; he is daily and hourly called upon to administer justice. He is the general preserver of the peace and good order of society. Speaking of the institution of justices of the peace, lord Coke says, ‘It is such a form of subordinate government for the tranquillity and quiet of the realm, as no part of the christian world hath the like, if the same be duly executed.’ A magistrate of such power, and so important in the regulation of civilised society, ought to be well versed in the duties of his office. He should understand the nature of crimes, the law of evidence, the statutes regulating punishments, the forms of proceeding, and the rights of the citizen. His ignorance on any of these subjects may occasion much injustice and oppression. And it may even be questioned, when we take into view the vast number of cases in which they are required to act, whether the unskilfulness of justices might not produce a greater amount of injury and vexation, than could arise from the want of knowledge in higher judicial officers.

The ignorance of justices with regard to their duty has often been, however, a subject of complaint, both in Massachusetts and elsewhere. The causes of this want of knowledge, as far as it respects our own country, will partly appear from the following passage of our author.

‘Many, perhaps the greater part of the magistrates in this country, have not the means of acquiring a competent knowledge of their official duties. With respect to such of those duties as it is the object of this undertaking to explain, no treatise specially confined to them, and fully pointing them out, has ever been published, either in this country, or, (as it is believed,) in England. In the year 1773, an abridgment of Dr Burn’s ‘Justice of the Peace and Parish Officer’ was made and published in Boston. This was a useful undertaking at the time; but much of the matter, selected for that abridgment, is inapplicable to, and foreign from the object of this work. A volume by Samuel Freeman, Esq. and another by R. Dickinson, Esq. upon the office and duty of justices of the peace, have also been published in Massachusetts. But very small portions, in either of these, relate to the subject of criminal prosecutions. They were, probably, not intended by their respectable authors, as complete guides in that branch of a justice’s duty.

‘It is not to be expected that many of our practising magistrates can obtain the requisite information upon this branch of their duty from English law books. The more ancient treatises, such as those of Lambard, Crompton, and Dalton, have ceased to be practical guides, though frequently resorted to as venerable authorities. The work of Dr Burn, before alluded to, is of high and unquestionable authority; but the former editions of it contain four volumes, by far the greater part of which is of no use to an American magistrate. An analysis upon this subject is contained in the first volume of Mr Chitty’s Practical Treatise on the Crown Law, published A. D. 1816. The English edition of this work is in four large volumes, and comprises a complete system of practice, pleading, and evidence, in criminal prosecutions in the English courts; together with a copious collection of precedents and practical forms used in those courts. This work is of value in the library of a lawyer; but a very small portion of it is of any immediate use to a practising magistrate in this country. The size and expense of it are somewhat diminished by a late edition in two volumes, by Richard Peters, jun. Esq. of Pennsylvania. Still the expense of purchasing this, or any other English work, merely for what it contains upon the particular duties of a justice of the peace in criminal prosecutions, cannot be readily or conveniently incurred. Two other works upon the powers and duties of justices of the peace and parish officers have been published within a few years; one by Thomas W. Williams, in five volumes; the other by William Dickinson, in two volumes; but they have not as yet been received in this part of the United States.’ p. 3—5.

We may add, that no compilation with which we are acquainted, supersedes the necessity of such a work as that

before us. We think too the author might have insisted even more than he has done, on the little use of which the English books can be in this country. Our criminal jurisprudence deviates so widely from that of our parent country, that a large part of every English book relating to justices, must be of little practical application in the United States.

The work before us is not unworthy of the high reputation, which its author maintains in his profession. It is a very clear and methodical summary of the duties of justices in criminal cases. Although exhibiting much legal science, it is essentially a practical work, and could only have been written by one practically familiar with the subject of which it treats. Justices of the peace will find it a safe and convenient assistant in the discharge of their official labors. The advice, which is occasionally given to the magistrate, is rendered valuable from the long experience of the author; and is well adapted to solve those doubts, which most frequently arise. The directions as to the justice's duty in taking bail, recognising parties and witnesses, and taxing costs, are peculiarly useful and convenient, and but a small part of them are to be found in any other treatise.

The first part of the volume contains a history of the mode of proceeding before a justice in criminal prosecutions. The proceedings are traced accurately and minutely, and the duties of the magistrate are plainly pointed out. The law of evidence, as far as it is necessary, is also included in this part of the work. The second part begins with a collection of forms. They appear to be drawn with great care and skill; and are recommended by their neatness and precision. Everything is stated in a full and satisfactory manner, and yet without that prolixity and tautology, which disfigure too many of the English precedents. This part also comprises the law with regard to the various subjects of criminal prosecutions, alphabetically arranged, and contains forms under most of the titles.

Without asserting that the work before us is free from defects, we are not conscious of any undue partiality in stating, that in correctness and ability it will bear a favorable comparison with the most distinguished treatises on similar subjects. On one subject, however, the law is not laid down with accuracy; which we notice here, not as a proof of

general inattention, but merely that the sanction of the author's name may not mislead others. It is said, that 'Quakers and *others*, who decline taking an oath on account of their religious scruples,' are permitted to *affirm*. (p. 18.) The same statement is afterwards repeated. (p. 92, 93.) The statute of this State confines the exemption from taking oaths strictly to Quakers.* The author was doubtless inadvertently led into this error, from the practice which has prevailed, though incorrect, of permitting other persons besides Quakers to *affirm*, who were scrupulous on the subject of oaths.

In a few cases the author indulges too freely in moral reflections, as for instance, on the subjects of duelling and sabbath breaking. It would no doubt have been proper for him briefly to express his sentiments on offences of this nature, but the discussions and animadversions running through several pages are rather out of place in a legal treatise.

The following extract, relative to breaking open houses, for the purpose of apprehending offenders, and preventing crimes, is interesting to readers of all classes.

'In what cases doors may be broken open in furtherance of the purposes of justice, are questions of great delicacy and importance, in relation to the execution of warrants, and the apprehension of criminal offenders. A knowledge of the law, as it concerns the powers and duties of officers in these cases, becomes more important and necessary from the circumstance, that the most eminent writers upon the criminal law have differed in their opinions upon this subject.

'The first general principle is, that no man's house or castle can be violated with impunity, except in those cases only where absolute necessity compels the disregard of inferior rights, in order to secure public benefit; and therefore in all cases where the law is silent and express principles do not apply, this extreme violence is illegal. And this principle is carried so far in the civil law, that for the most part, not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls. There is a distinction between the powers of officers and private individuals in this respect. For it is said that the former,

* Mass. st. 1810. c. 127. See also 2 Gall. R. 364. In this case, a witness, not a Quaker, refused to take an oath, alleging conscientious scruples. But the judge said that the statute only extended to Quakers; and committed the witness for a contempt.

being enjoined by law to apprehend a party suspected, may be justified in breaking open doors to apprehend him, on mere suspicion of felony ; and will be justified though it appear that the suspicion was groundless ; but a private individual acts at his own peril, and if the party be innocent would be liable to an action for breaking open doors without warrant.

‘ The reason of this difference between the arrests of private persons and officers, upon suspicion only, is, that in the former case the arrest upon suspicion is only permitted ; and if omitted is not punishable ; and therefore they are not permitted to break open doors ; but in case of officers, they are punishable, if they omit this duty. Another and sufficient reason arises from the great inconvenience and danger of admitting every private man, upon pretence of suspicion, to break open houses ; whereas officers, and the authority with which they are clothed, are publicly known and presumed to be sufficient.

‘ It is a principle of law so clearly settled, as that no doubt or fear need be apprehended concerning it, that when it is certain a felony has been committed, or a dangerous wound given, and the offender, upon pursuit, takes refuge in his own house, either a constable, or other peace officer, or any private individual, may, without warrant, break open his doors, if refused admittance after proper demand. And when an affray is made in a house, in the view or hearing of a peace officer, he may break open the outer door in order to suppress it. So in some extreme cases it has been holden, that a private individual may break and enter the house of another, to prevent his murdering one who cries out for assistance. But it is doubted whether this power extends to an officer or private person when felony is only *suspected*, and has not been committed *within the view* of the party making the arrest. It is said to be certain that an officer may break open doors, upon the positive information of another who was actually a witness to the felony ; and a marked distinction between the power of officers and private individuals is, that the latter can act only on their own knowledge, while the former may proceed on the information of others. A peace officer may justify an arrest on a reasonable charge of felony *without a warrant*, although it should afterwards appear that no felony had been committed ; but a private individual cannot. We may therefore take it as settled law, that a private person may break open doors after a proper demand and notice, when he is certain that a felony has been committed ; and that a constable may do the same upon the information of the party in whom the knowledge, or reasonable suspicion exists.’ p. 67—69.
